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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1930.

No. 115

W. P. BROWN & SONS LUMBER COMPANY,
PETITIONER,

v.

COMMISSIONER OF INTERNAL REVENUE,
RESPONDENT.

BRIEF FOR PETITIONER.

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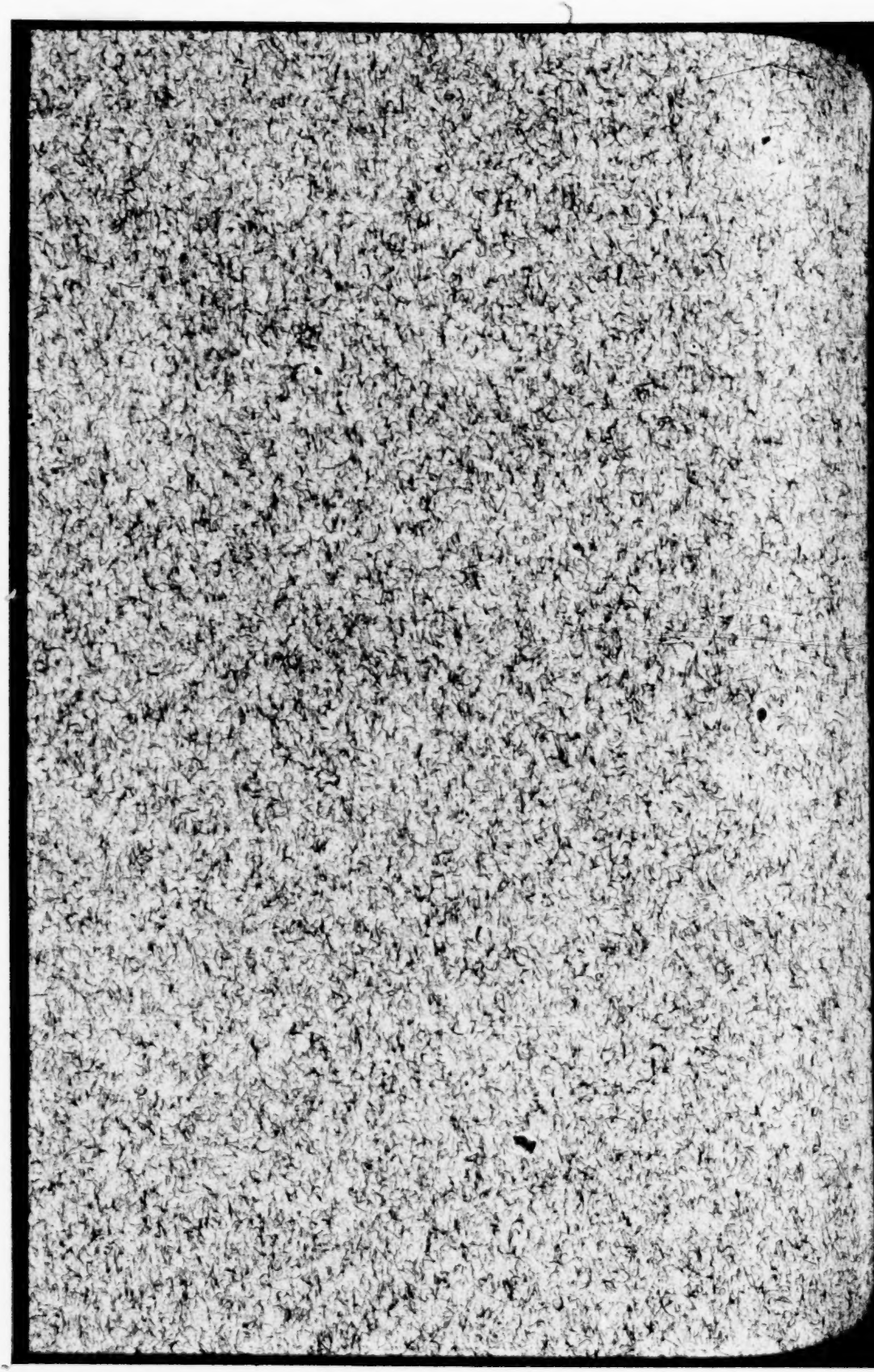

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No. 115

W. P. BROWN & SONS LUMBER COMPANY,
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v.

COMMISSIONER OF INTERNAL REVENUE,
RESPONDENT.

BRIEF FOR PETITIONER.

MAY IT PLEASE THE COURT:

This is an appeal granted by this Court from a decision of the Circuit Court of Appeals, Sixth Circuit, holding petitioner to be liable for certain income taxes, for 1917, assessed against it by the Commissioner of Internal Revenue in March, 1923.

Unless otherwise indicated, the italics of this brief are ours.

Copies of the sections of the Revenue Acts involved on this appeal appear in the appendix of this brief.

Opinion of the Court Below.

The opinion of the Court below was rendered by the Circuit Court of Appeals, Sixth Circuit, on February 21, 1930. It is reported in 38 Fed. (2d) at page 425. It is a part of the record on this appeal (Rec. 36-50).

Jurisdiction.

This Court has heretofore granted a writ of certiorari under Section 240 of the Judicial Code as amended. That section provides (U. S. C. A., Title 28, Section 347):

> "In any case, civil or criminal, in a circuit court of appeals, or in the Court of Appeals of the District of Columbia, it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, whether Government or other litigant, to require by certiorari, either before or after a judgment or decree by such lower Court, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal."

This is an action, originating in the United States Board of Tax Appeals, involving the power of the Commissioner of Internal Revenue to collect additional income-excess profits taxes from this petitioner for 1917 (Rec. 6-12).

The jurisdiction of this Court to review decisions of the Circuit Courts of Appeals of the several Circuits is recognized in Rule 38 of the Rules of this Court.

Statement of the Case.

The 1917 income-excess profits tax return of the petitioner was filed on April 1, 1918 (Rec. 37).

In March, 1923, an additional assessment for 1917 was made by respondent against petitioner. The amount of this additional assessment was subsequently reduced by the Bureau of Internal Revenue and the Board of Tax Appeals to $3,498.27, the amount involved on the present appeal. No part of this amount has been paid.

An abatement claim was filed by petitioner with the Collector of Internal Revenue on March 27, 1923, against the additional assessment in question.

On October 28, 1925, a deficiency letter was mailed by respondent to petitioner, wherein a determination of its tax liability for 1917 was shown. This letter allows petitioner's abatement claim in part and rejects it in part.

On November 18, 1925, petitioner appealed from this determination to the Board of Tax Appeals. Upon final hearing the Board of Tax Appeals held that petitioner was liable for $3,498.27, the unabated portion of the amount assessed by respondent in March, 1923.

No proceeding in Court or by distraint has been instituted by respondent for the collection of such additional assessment, in whole or in part. As said by the lower Court (Rec. 43):

> "It is conceded that unless the right of collection has been kept alive by waivers and by the provisions of the Revenue Acts of 1924 and 1926, the collection of the unabated stipulated portion of the additional assessment for 1917 is now barred under Section 250(*d*) of the Revenue Act of 1921."

On December 13, 1920 petitioner filed with respondent a 1917 assessment waiver, unlimited as to time of expiration. On December 10, 1923, a waiver relating to determination, assessment, and collection of certain taxes for 1917 was filed by petitioner. The latter waiver expired according to its terms on December 10, 1924.

Finally, on October 25, 1924, petitioner filed with respondent a waiver relating to determination, assessment, and collection of certain taxes for the years 1917 to 1919, inclusive. Our view is that this waiver expired, according to its terms, on December 10, 1925.

The determination of the Board of Tax Appeals was entered on August 10, 1928, prior to which time no step had been taken by respondent looking to the collection of the 1917 additional taxes.

The three waivers above mentioned read as follows:

> "Received
> Dec. 13, 1920.
> Natural Resources
> Sub-Division.
>
> *Waiver.*
>
> W. P. Brown & Sons Lumber Company, a corporation, organized under the laws of the State

of Kentucky, in consideration of the assurance given it by officials of the Income Tax Unit of the Bureau of Internal Revenue that its liability for all Federal taxes imposed by the Act of Congress, approved September 8, 1916, as amended by the Act of Congress, approved October 3, 1917, for the year ended December 31, 1917, on its net income received from all sources in said year, shall not be determined except after deliberate, intensive and thorough consideration, hereby waives any and all statutory limitations as to the time within which assessments based upon such liability may be entered. It is understood, however, that the above corporation does not, by the execution of this waiver, admit in advance the correctness of any assessment which may be made against it for said year by the officials of the Income Tax Unit.

[SEAL.] W. P. BROWN & SONS LUMBER CO.,

(Signed) Per J. G. BROWN,
Pres. Corporation.

Approved Dec. 2, 1922.
(S.) D. H. BLAIR,
Commissioner of Internal Revenue."

"Received
Dec. 14, 1923,
Engineering Div.
Dec. 10th, 1923. (Date)

Income and Profits Tax Waiver

In pursuance of the provisions of subdivision (*d*) of Section 250 of the Revenue Act of 1921, W. P. Brown & Sons Lumber Company of Louisville, Kentucky, and the Commissioner of In-

ternal Revenue, hereby consent to a determination, assessment, and collection of the amount of income, excess-profits, or war-profits taxes due under any return made by or on behalf of the said * * * for the years 1917 and 1918, under the Revenue Act of 1921, or under prior income, excess-profits, or war-profits tax Acts, or under Section 38 of the Act entitled 'An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes,' approved August 5, 1909. This waiver is in effect for one year from the date it is signed by the taxpayer.

[SEAL.] W. P. BROWN & SONS LUMBER CO.,
(Signed) By PRESTON P. JOYES,
Treas.

(Signed) D. H. BLAIR,
Commissioner.

Dec. 15, 1923.

If this waiver is executed on behalf of a corporation, it must be signed by such officer or officers of the corporation as are empowered under the law of the State in which the corporation is located to sign for the corporation, in addition to which, the seal, if any, of the corporation must be affixed."

"October 25, 1924.
(Date)

Income and Profits Tax Waiver.

In pursuance of the provision of existing Internal Revenue Laws, W. P. Brown & Sons Lumber Company, a taxpayer, of Louisville, Kentucky, and the Commissioner of Internal

Revenue, hereby consent to extend the period prescribed by law for a determination, assessment, and collection of the amount of income, excess-profits, or war-profits taxes due under any return made by or on behalf of said taxpayer for the years 1917, 1918 and 1919 under the Revenue Act of 1924 or under prior income, excess-profits, or war-profits tax acts, or under Section 38 of the Act entitled 'An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes,' approved August 5, 1909. This waiver is in effect for a period of one year after the expiration of the statutory period of limitation within which assessments of taxes may be made for the year or years mentioned or the statutory period of limitations as extended by Section 277 (*b*) of the Revenue Act of 1924, or by any waivers already on file with the Bureau.

W. P. BROWN & SONS
LUMBER CO.,
(Signed) By J. G. BROWN,
Pres.

(Signed) D. H. BLAIR,
Commissioner.

(Received in Review Division Feb. 26, 1925, Solicitor's Office.)

Attest:
(Signed) LEROY OLCOTT,
[SEAL.] *Secretary.*

If this waiver is executed on behalf of a corporation, it must be signed by such officer or officers of the corporation as are empowered under the laws of the State in which the corporation is located to sign for the corporation, in ad-

dition to which, the seal, if any, of the corporation, must be affixed."

Specification of Errors.

The lower Court erred in its conclusions of law in the present case, as follows:

1. In holding valid the waiver of October 25, 1924, given after the expiration of the statutory period for collecting the additional assessment for 1917. The Revenue Acts of 1921 and 1924 contemplate that waivers shall be obtained by the Commissioner of Internal Revenue before the expiration of the statutory period.

2. In holding that the period for making collection of such taxes was extended by Sections 277 (*b*) and 278 (*d*) of the Revenue Act of 1924.

3. In holding that the period for collecting such taxes was extended by Section 283 (*c*) and (*f*) and related sections of the Revenue Act of 1926.

4. In holding that the power to collect such taxes existed on August 10, 1928, the date on which the Board of Tax Appeals entered its order of redetermination.

The waiver that influenced the decision of the lower Court is that of October 25, 1924. Our view is that this waiver is not effective here, for these reasons:

(*a*) Because it was invalid at all times, it and the only earlier collection waiver having been given after the bar of the statute of limitations had fallen.

(*b*) Because, as it affected the collection period, it expired according to its terms long before August 10, 1928, the date on which the Board of Tax Appeals entered its order of redetermination.

Our view, further, is that the period of limitation for collecting the taxes here involved was not extended by either the Revenue Act of 1924 or the Revenue Act of 1926.

The errors assigned will be considered in the order in which they have been stated.

ARGUMENT.

The Court below erred in holding valid the waiver of October 25, 1924, given after the expiration of the statutory period for collecting the additional assessment for 1917. The Revenue Acts of 1921 and 1924 contemplate that waivers shall be obtained by the Commissioner of Internal Revenue before the expiration of the statutory period.

The first waiver relating to the collection period was given by petitioner on December 10, 1923. As the return for 1917 was filed on April 1, 1918, the statutory period for collecting taxes for that year expired on April 1, 1923, five years after the date of the filing of the return. Section 250 (*d*) of the Revenue Act of 1921. It therefore appears that respondent's right of collection expired about eight months before the waiver of December 10, 1923, was given.

The immediate question—whether a waiver given after the bar of the statute had fallen is valid—is be-

fore this Court in the case of Charles H. Stange *v.* United States, appealed from the Court of Claims, being No. 554 of the October term, 1929. The question has been fully argued in that case; and the decision of the Court in that case will, we assume, be controlling of the question of the validity of the waiver in the present case.

If it be held that the collection waivers of December 10, 1923, and October 25, 1924, are invalid, it will follow that the decision of the lower Court should be reversed as no step looking to collection was taken prior to April 1, 1923, the date on which the statutory period of limitation expired.

In the remainder of this brief we shall assume, for purposes of the discussion, that the waivers in question are valid.

The Court below erred in holding that the period for making collection of the taxes involved in the present case was extended by Sections 277(b) and 278(d) of the Revenue Act of 1924.

Before entering upon a discussion of this proposition, we call attention to the dates of the expiration of the waivers of December 13, 1920, and December 10, 1923. The earlier of these was terminated on April 1, 1924, by respondent, by the issuance of Mim. 3085, reported at page 174 of Cumulative Bulletin of Internal Revenue Rulings, Vol. II-1. This mimeograph is as follows:

"TREASURY DEPARTMENT.

Office of Commissioner of Internal Revenue,

Washington, D. C.

APRIL 11, 1923.

Unlimited waivers for 1917 income taxes held to expire April 1, 1924.

To Collectors of Internal Revenue, Internal Revenue Agents in Charge, and Others Concerned:

The form of waiver now in use extends the time in which assessments of 1917 income and excess-profits taxes may be made to one year from the date of signing by the taxpayer. Inasmuch as there are many waivers on file signed by taxpayers containing no limitation as to the time in which assessments for 1917 may be made, all such unlimited waivers will be held to expire April 1, 1924.

D. H. BLAIR,
Commissioner."

The effective period of the waiver of December 10, 1923, is defined therein as follows: "This waiver is in effect for one year from the date it is signed by the taxpayer." Clearly, therefore, it expired December 10, 1924.

This leaves for consideration only the waiver of October 25, 1924, which defines its effective period as follows:

> "This waiver is in effect for a period of one year after the expiration of the statutory period

> of limitations within which assessments of taxes may be made for the year or years mentioned, or the statutory period of limitations as extended by Section 277(*b*) of the Revenue Act of 1924, or by any waivers already on file with the Bureau."

The last clause of the provision thus limits the effective period to one year after the statutory period of limitation as extended "by any waivers already on file with the Bureau." We have seen that the statutory period had previously been extended to December 10, 1924. The last clause of the waiver of October 25, 1924, therefore provided for an expiration date of December 10, 1925.

We come next to the clause, "the statutory period of limitation as extended by Section 277(*b*) of the Revenue Act of 1924." No other section or subdivision of any Revenue Act is referred to in the waiver.

The instrument under consideration relates not alone to *collection*, but also to *determination* and *assessment*, viz., to the three powers, stated separately; and it is perhaps not surprising that there should be found in the waiver provisions which are limited to the exercise of one as distinguished from the other two powers.

The section referred to in the waiver (Section 277(*b*) of the Revenue Act of 1924) provides:

> "The period within which *an assessment is required to be made* by subdivision (*a*) of this section in respect of any deficiency shall be extended (1) by 60 days if a notice of such deficiency has been mailed to the taxpayer under subdivision (*a*) of section 274 and no appeal

> has been filed with the Board of Tax Appeals, or, (2) if an appeal has been filed, then by the number of days between the date of the mailing of such notice and the date of the final decision by the Board."

While this subdivision is a part of a section that deals with collection as well as assessment, it is clearly limited by its terms to the exercise of the power to make the assessment. It does not undertake to extend the period of collection.

We suggest, therefore, that it will not avail respondent to point to the date on which the deficiency letter was mailed (October 28, 1925) or the date on which the petition was filed at the Board of Tax Appeals (November 18, 1925). The effect upon the limitation periods of the mailing of the deficiency letter and the pendency of the appeal at the Board of Tax Appeals is to be taken from the above-quoted provision of the 1924 Act. The statute is entirely clear on this point. Its effect is unmistakable. The mailing of the deficiency letter and the pendency of the appeal, under the very letter of the statute, served to extend the assessable period only. To construe the section to apply to the right of collection also, is to read something into it that Congress did not see fit to place there.

Section 278(*d*) of the Revenue Act of 1924 is also inapplicable to the present case. That subdivision allows six years after assessment in which to make collection. However, subdivision (*e*) of the same section provides that Section 278 shall not affect any assessment made before June 2, 1924, the date of the enactment of this Act. We need but recall that the assess-

ment here involved was made in March, 1923; and that the provision of subdivision (*e*) just referred to was vitalized by this Court in its decision in the case of Benjamin Russell *v.* United States, 278 U. S. 181. It was there held that in view of the language of subdivision (*e*), Section 278 had no application to an assessment made prior to the effective date of the Act of which it is a part.

It is conceded in the opinion below that "if, in the instant case, the definite and final assessment of this deficiency tax was prior to June 2, 1924, then the Russell case governs it."

The plain facts are these:

On March 5, 1923, respondent made a deficiency assessment against petitioner in the amount of $38,035.46. This is the allegation of respondent's answer filed at the Board of Tax Appeals (Rec. 15); and the fact that the assessment was made on *March 5, 1923*, is expressly recognized in the opinion below (Rec. 37).

Later in the same month (March, 1923) petitioner filed its abatement claim against the deficiency assessment so made against it (Rec. 11-37).

On October 28, 1925, respondent mailed to petitioner his letter of final determination. This letter is a part of the record on this appeal (Rec. 6-12). On page 11 of the record are shown, in the deficiency letter, the original assessment of April, 1918 ($16,690.25), and that of March, 1923 ($38,035.46). On the same page of the record it appears that the amount of the *over-assessment*, according to the deficiency letter, was $18,533.75; and it is added, "Claim for abatement in the amount of $38,035.46 filed March 27, 1923" (Rec. 11).

From this *determination* petitioner prosecuted an appeal to the Board of Tax Appeals, on November 18, 1925. It should be clearly understood that the appeal to the Board of Tax Appeals was prosecuted from the *determination*, not from the making of the assessment which antedated by more than a year the creation of the Board of Tax Appeals.

On August 10, 1928, the Board entered its final order wherein it was "Ordered, adjudged and decided that as to the petitioner, W. P. Brown & Sons Lumber Company, for 1917, there is a *deficiency in payment* of $3,498.27 and an *unpaid assessment to be abated* in the amount of $11,140.93" (Rec. 19). The items entering into the computation by which the *deficiency in payment* of $3,498.27 was arrived at appear at page 27 of the record.

It thus appears that an assessment of an amount largely excessive was made by respondent against petitioner long prior to June 2, 1924; that the steps subsequently taken had for their purpose and effect the material reduction of such assessment; and that respondent's final determination of the 1917 deficiency did not involve the making of any additional assessment after June 2, 1924, but rather the abating of a part of the assessment previously made.

This question naturally suggests itself: Why should respondent make an additional assessment, for 1917, against petitioner after June 2, 1924, when it affirmatively appeared that this taxpayer had previously been overassessed for that year?

The correctness of what has just been said is demonstrated by the text of the decision of the Board of Tax

Appeals. The Board held that there was a *deficiency in payment* (not of assessment) of a stated amount and, further, that there was an unpaid assessment to be abated in part. There was no cancellation of the entire assessment previously made. The Board did not make or order the making of a deficiency assessment of any amount against petitioner; and it is not contended that respondent has in fact made any deficiency assessment against petitioner, for 1917, since the date of the passage of the Revenue Act of 1924, whatever may be contended as to the effect of the *determination* of October 28, 1925.

The Court below, however, says in its opinion (Rec. 48):

> "The assessment of March, 1923 was a jeopardy assessment to which petitioner immediately filed a claim in abatement. The final determination of this assessment and its collection would await the Commissioner's action on the claim for abatement, under the common practice * * *; that such was petitioner's understanding is shown by its petition to the Board of Tax Appeals in which it states that the deficiency letter of October 28, 1925, 'evidences the final determination by the Commissioner of the 1917 deficiency.'"

Petitioner reiterates here what it said in its petition for the appeal to the Board of Tax Appeals, viz., that the letter of October 28, 1925, evidences a final *determination* by the Commissioner of the 1917 deficiency. In October, 1925, the Commissioner *determined* that there was a *deficiency in payment* of taxes

for 1917, a "deficiency" being the difference between the amount of the liability and the amount shown on the return. Section 273 of the Revenue Act of 1924. In some cases, this final determination would have been followed by the making of an assessment, but here it was found that the taxpayer had already been over-assessed. Certainly, in the present case, the determination of October 28, 1925, did not involve, *as a step to be taken subsequently*, the making of any assessment for 1917. This fact alone serves to take this case out of the scope of Section 277 (*b*) of the Revenue Act of 1924.

The opinion below continues (Rec. 48):

> "Had it not been so, petitioner would have had no right of appeal to the Board under Sec. 280 of the Act of 1924; this requires a final determination, necessarily prior to final assessment. * * * The fact that the amount of the deficiency as finally determined was covered by the jeopardy assessment theretofore made, did not render it any the less a deficiency which the Commissioner on October 28, 1925, finally determined should be assessed."

With all respect to the lower Court, we suggest that we have here a confusion of terms. It is hardly correct to say that the final determination must precede the assessment. The assessment often comes first, as it did in the present case, with a final determination later. Nor is it true that the Commissioner on October 28, 1925, finally determined that any amount *should be assessed*, although he determined on that date the

amount that *should have been assessed.* The determination of October 28, 1925, expressly states that petitioner had been previously overassessed, *i. e.*, by the assessment of March, 1923, in a stated amount; and as a matter of course no additional assessment was proposed by that determination. The appeal prosecuted by petitioner to the Board of Tax Appeals was from a notice of final determination, viz., from the final decision of the Commissioner upon the amount of the tax liability. Appeals are prosecuted from final decisions (not from assessments), and there is nothing in the procedure of appeals to the Board of Tax Appeals which departs from the general rule.

We see no escape from the conclusion that the decision of the Board is inconsistent with the opinion of this Court in Benjamin Russell *v.* United States, 278 U. S. 181. In that case this Court held broadly that Section 278 of the Revenue Act of 1924 was not applicable to assessments made before June 2, 1924. We ask for nothing more than the application of this rule to the present case.

Our conclusion, therefore, is that neither Section 277(*b*) nor Section 278(*d*) of the Revenue Act of 1924 extended the *period of collection* of the assessment here involved to any date later than December 10, 1925. It would follow that the power to collect such assessment, in whole or in part, expired long before the entry of the decision of either of the tribunals below.

The Court below erred in holding that the period for collecting such taxes was extended by Section 283(e) and (f) and related sections of the Revenue Act of 1926.

After holding that the period of limitation specfied in the waiver of October 25, 1924, had been extended by the Revenue Act of 1924, the Court below, going one step farther, held that the period of limitation was also extended by the Revenue Act of 1926. Said the Court (Rec. 48):

> "But, assuming that the jeopardy assessment of March 5, 1923 was the only assessment, we are of the opinion that the period for collection was extended by Section 283(*f*) of the Act of 1926 * * *."

It may not be inappropriate to recall at this time certain dates material to the present discussion, viz:

(*a*) The waiver was given on October 25, 1924.

(*b*) As it affected the collection period, it expired, according to its terms, on December 10, 1925.

(*c*) The Revenue Act of 1926 was enacted on February 26, 1926.

The waiver, therefore, expired prior to the passage and also prior to the effective date of the 1926 Act.

Section 283(*f*) of the 1926 Act, cited by the lower Court, follows:

> "If any deficiency in any income, war-profits, or excess-profits tax imposed by the Revenue Act of 1916, the Revenue Act of 1917, the Reve-

> nue Act of 1918, or the Revenue Act of 1921, or by any such Act as amended, was assessed before June 3, 1924, but was not paid in full before that date, and if the Commissioner after June 2, 1924, but before the enactment of this Act finally determined the amount of the deficiency, and if the person liable for such tax appealed before the enactment of this Act to the Board and the appeal is pending before the Board at the time of the enactment of this Act, the Board shall have jurisdiction of the appeal. In all such cases the powers, duties, rights, and privileges of the Commissioner and of the person who has brought the appeal, and the jurisdiction of the Board and of the courts, shall be determined, and the computation of the tax shall be made, in the same manner as provided in subdivision (*e*) of this section, except as provided in subdivision (*j*) of this section, and except that the person liable for the tax shall not be subject to the provisions of subdivision (*d*) of section 284."

Section 283(*j*) and Section 284(*d*) are without application to the present case. Subdivision (*e*) of Section 283 will be considered presently. What is the effect of Subdivision (*f*) of Section 283? Does it extend the statutory period of collection? Undoubtedly, the primary effect of the subdivision is to confirm the jurisdiction already assumed by the Board of Tax Appeals. Ormsby, McKnight, Mitchell, 1 B. T. A. 143; Boston Structural Steel Company, 1 B. T. A. 602; Buffalo Slag Company, 1. B. T. A. 749. The previous decisions of the Board upon the contested question of its jurisdiction of the class of cases described in Sub-

division (*f*)—the power to hear and decide such cases—thus received legislative approval.

There should be read and considered with this subdivision the following provision of Section 1000 of the same Act, which was amendatory of the 1924 Act:

> "If the assessment or collection of any tax is barred by any statute of limitations, the decision of the Board to that effect shall, for the purposes of this title and of the Revenue Act of 1926, be considered as its decision that there is no deficiency in respect of such tax."

We thus find express legislative authority for the proposition that the Board may decide there is no deficiency *in payment* because the *collection* of the tax was barred by the statute of limitations. The effect of the two subdivisions read together is therefore that the jurisdiction to hear and determine cases such as we have here extends to questions involving the statute of limitations fixing the collection period. But we fail to find in either subdivision any provision which serves to extend the period of limitation fixed by earlier statutes.

Section 283(*e*), referred to in Subdivision (*f*), follows:

> "If any deficiency in any income, war-profits, or excess-profits tax imposed by the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, or the Revenue Act of 1921, or by any such Act as amended, was assessed before June 3, 1924, but was not paid in full before the date of the enactment of this Act, and if the Commissioner, after the enactment of this

> Act, finally determines the amount of the deficiency, he is authorized to send by registered mail to the person liable for such tax notice of such deficiency, which notice shall, for the purposes of this act, be considered a notice under subdivision (*a*) of section 274 of this Act. In the case of any such final determination the amount of the tax (whether deficiency or interest, penalty, or other addition to the tax) shall, except as provided in subdivision (*h*) of this section, be computed as if this Act had not been enacted, but the amount so computed shall be collected and paid in the same manner and subject to the same provisions and limitations (including the provisions in case of delinquency in payment after notice and demand, and the provisions relating to claims and suits for refund) as in the case of a deficiency in the tax imposed by this title, except as otherwise provided in section 277 of this Act and in subdivision (*i*) of this section."

Section 277 (*a*) relates to the assessable period and to the period for enforcing collection by suit. Subdivision (*b*) of that section provides:

> "The running of the statute of limitations provided in this section or in section 278 on the making of assessments and the beginning of distraint or a proceeding in court for collection, in respect of any deficiency, shall (after the mailing of a notice under subdivision (*a*) of section 274) be suspended for the period during which the Commissioner is prohibited from making the assessment or beginning distraint or a proceeding in court, and for 60 days thereafter."

Nothing in this subdivision or in section 283 (*e*) indicates that their provisions should be given a retroactive effect *as to the period during which the running of the statute of limitations is to be suspended.* The natural construction is that their provisions are applicable to taxes not barred at the date of their enactment and that the period of suspension referred to is one that follows the enactment of the Act of which they are a part. The Courts have always been averse to the retroactive construction of a statute unless the declaration of retroactivity be "clear, strong, and imperative". United States *v.* Heth, 3 Cranch 298, 413, cited with approval in Shwab *v.* Doyle, 258 U. S. 529. Statutes will not be given a retroactive effect, in the absence of a declaration of retroactivity of this sort, where the effect of such a construction is to impair rights fixed prior to the enactment of the statute. It has been said, in substance, by this Court that the principles of our jurisprudence are repellant to a construction of a statute which will destroy retroactively rights legally acquired prior to its enactment. Ibanez de Aldecoa *v.* Hongkong Bkg. Corp., 246 U. S. 621; Cameron *v.* United States, 231 U. S. 710; Shwab *v.* Doyle, 258 U. S. 529; Llewellyn *v.* Frick, 268 U. S. 250.

The limitation period for collection after assessment, carried in the 1926 Act, is to be found in Section 278 (*d*), which fixes a period of six years after assessment, consistently with the same numbered section of the 1924 Act. Subdivision (*e*) of Section 278 of the 1926 Act, however, provides that the section will not authorize the collection of a tax, "if at the time of

the enactment of this Act such * * * proceeding was barred by the statutory period of limitation properly applicable thereto, unless prior to the enactment of this Act the Commissioner and the taxpayer agreed in writing thereto".

The preceding portion of this sentence refers to proceedings begun before June 2, 1924; and it is entirely clear that the collection proceeding referred to in the quoted provision is one that is to begin after the passage of the Act. The excepting clause requires a written agreement "thereto" between the Commissioner and the taxpayer. When read in connection with the text of the entire subdivision, this can mean nothing other than that, to make the excepting clause applicable, the Commissioner and the taxpayer must have agreed in writing to the collection of the tax at some time after February 26, 1926, the date of the enactment of the Act—which they did not do in the present case. This construction, it is to be noted, is in complete harmony with the rule against retroactive application referred to above.

Referring to Section 283 (1), the Court below said (Rec. 49):

> "Section 283 (1) provides that in the case of any tax imposed by a prior Act, the running of the statute shall be considered to have been suspended (in addition to the period of suspension provided in Section 277 (*b*)) for any period prior to the enactment of the Act of 1926, during which the Commissioner was prohibited from making an assessment or beginning distraint or proceeding in Court."

For no period of time, not even for a day, prior to the enactment of the 1926 Act, was the Commissioner prohibited from "beginning distraint or proceeding in Court", in the present case. Under the 1924 Act and earlier Revenue Acts, no inhibition on collection followed the mailing of a deficiency notice or the making of a deficiency assessment. Section 274 of the Revenue Act of 1924. The inhibition of this character did not come until the enactment of the 1926 Act. Section 274 of the Revenue Act of 1926. In view of the language of the regulations it will not be contended, we assume, that any such inhibition resulted from the filing of the abatement claim. Article 1032 of Regulations 62, in effect when the abatement claim was filed in this case, provides:

> "The filing of a claim for abatement does not necessarily operate as a suspension of the collection of the tax or make it any less the duty of the Collector to exercise due diligence to prevent the collection of the tax being jeopardized. He should, if he considers it necessary, collect the tax and leave the taxpayer to his remedy by a claim for refund."

Our general conclusion is that no provision of the 1926 Act, when properly construed, serves to extend the statutory period for making collection defined in earlier Acts or the period of its effectiveness so clearly defined in the waiver of October 25, 1924.

The waiver of October 25, 1924, having expired on December 10, 1925, the power to collect the tax here involved was lost prior to August 10, 1928, the date on which the order of redetermination was entered by the Board of Tax Appeals.

The assessment here involved was made under Section 250 (*d*) of the Revenue Act of 1921. That subdivision provides, in part:

> "The amount of income, excess-profits, or war-profits taxes due under any return made under this Act for the taxable year 1921 or succeeding taxable years shall be determined and assessed by the Commissioner within four years after the return was filed, and the amount of any such taxes due under any return made under this Act for prior taxable years or under prior income, excess-profits, or war-profits tax Acts, or under Section 38 of the Act entitled 'An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes', approved August 5, 1909, shall be determined and assessed within five years after the return was filed, unless both the Commissioner and the taxpayer consent in writing to a later determination, assessment, and collection of the tax; and no suit or proceeding for the collection of any such taxes due under this Act, or under prior income, excess-profits, or war-profits tax Acts, or of any taxes due under section 38 of such Act of August 5, 1909, shall be begun, after the expiration of five years after the date when such return was filed, but this shall not affect suits or proceedings begun at the time of the passage of this Act."

As the 1917 return was filed on April 1, 1918, the statutory period for collection terminated on April 1, 1923. However, the waivers given by petitioner served to extend the period to December 10, 1925. We have seen that the Revenue Acts of 1924 and 1926 are without application to the present case. From what source, then, was derived the power to collect found by the Board of Tax Appeals to have been still in existence on August 10, 1928?

Our view is that this proposition follows as a matter of course from the conclusions reached in this brief. We have seen that the jurisdiction to enter a finding of no deficiency on the ground that the collection of the tax was barred by the statute has been expressly conferred upon the Board of Tax Appeals. Section 1000 of the Revenue Act of 1926. The failure of the Board to so find is the error complained of on this appeal.

We do not know to what extent the Court below was influenced by its conception of the rule of construction applicable to limitation provisions of taxing statutes. Referring to a contention presented by petitioner, the lower Court said (Rec. 44):

> "We find nothing in the text or content of Section 250 (*d*) to require this construction. Statutes imposing limitations upon action by the United States are to be strictly construed in favor of the Government."

In the case of United States *v.* Updike, 281 U. S. 489, 496, decided May 19, 1930, this Court held:

> "It may be that the saving clause was not strictly necessary, but was inserted from excessive care to put the right of the taxpayer beyond dispute. In any event, we think this is the fair interpretation of the clause, and the one which must be accepted, especially in view of the rule which requires taxing acts, *including provisions of limitation embodied therein*, to be construed liberally in favor of the taxpayer. Bowers *v.* New York & Albany Lighterage Company, 273 U. S. 346, 349."

For these reasons, a reversal of the decision of the Circuit Court of Appeals, Sixth Circuit, is respectfully requested.

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APPENDIX.

Revenue Act of 1921, 42 Stat. at L. 227-264.

SEC. 250 (*d*). The amount of income, excess-profits, or war-profits taxes due under any return made under this Act for the taxable year 1921 or succeeding taxable years shall be determined and assessed by the Commissioner within four years after the return was filed, and the amount of any such taxes due under any return made under this Act for prior taxable years or under prior income, excess-profits, or war-profits tax Acts, or under Section 38 of the Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes", approved August 5, 1909, shall be determined and assessed within five years after the return was filed, unless both the Commissioner and the taxpayer consent in writing to a later determination, assessment, and collection of the tax; and no suit or proceeding for the collection of any such taxes due under this Act or under prior income, excess-profits, or war-profits tax Acts, or of any taxes due under section 38 of such Act of August 5, 1909, shall be begun, after the expiration of five years after the date when such return was filed, but this shall not affect suits or proceedings begun at the time of the passage of this Act.

Revenue Act of 1924, 43 Stat. at L. 253-297.

SEC. 273. As used in this title the term "deficiency" means—

(1) The amount by which the tax imposed by this title exceeds the amount shown as the tax by the taxpayer upon his return; but the amount so shown on the return shall first be increased by the amounts pre-

viously assessed (or collected without assessment) as a deficiency, and decreased by the amounts previously abated, credited, refunded, or otherwise repaid in respect of such tax.

SEC. 274. (*a*) If, in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this title, the taxpayer, except as provided in subdivision (*d*), shall be notified of such deficiency by registered mail, but such deficiency shall be assessed only as hereinafter provided. Within 60 days after such notice is mailed the taxpayer may file an appeal with the Board of Tax Appeals established by Section 900.

SEC. 274. (*b*). If the Board determines that there is a deficiency, the amount so determined shall be assessed and shall be paid upon notice and demand from the collector. No part of the amount determined as a deficiency by the Commissioner but disallowed as such by the Board shall be assessed, but a proceeding in court may be begun, without assessment, for the collection of any part of the amount so disallowed. The court shall include in its judgment interest upon the amount thereof at the rate of 6 per centum per annum from the date prescribed for the payment of the tax to the date of the judgment. Such proceeding shall be begun within one year after the final decision of the Board, and may be begun within such year even though the period of limitation prescribed in section 277 has expired.

SEC. 277. (*b*) The period within which an assessment is required to be made by subdivision (*a*) of this section in respect to any deficiency shall be extended (1) by 60 days if a notice of such deficiency has been mailed to the taxpayer under subdivision (*a*) of section 274 and no appeal has been filed with the Board of Tax Appeals, or, (2) if an appeal has been filed,

then by the number of days between the date of the mailing of such notice and the date of the final decision by the Board.

SEC. 278. (*d*) Where the assessment of the tax is made within the period prescribed in section 277 or in this section, such tax may be collected by distraint or by a proceeding in court, begun within six years after the assessment of the tax. Nothing in this Act shall be construed as preventing the beginning, without assessment, of a proceeding in court for the collection of the tax at any time before the expiration of the period within which an assessment may be made.

SEC. 278. (*e*) This section shall not (1) authorize the assessment of a tax or the collection thereof by distraint or by a proceeding in court if at the time of the enactment of this Act such assessment, distraint, or proceeding was barred by the period of limitation then in existence, or (2) affect any assessment made, or distraint or proceeding in court begun, before the enactment of this Act.

Revenue Act of 1926, 44 Stat. at L. 9-55.

SEC. 274. (*a*) If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this title, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within 60 days after such notice is mailed (not counting Sunday as the sixtieth day), the taxpayer may file a petition with the Board of Tax Appeals for a redetermination of the deficiency. Except as otherwise provided in subdivision (*d*) or (*f*) of this section or in section 279, 282, or 1001, no assessment of a deficiency in respect of the tax imposed by this title and no distraint or proceeding in court for its collection shall be made, begun, or

prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such 60-day period, nor, if a petition has been filed with the Board, until the decision of the Board has become final. Notwithstanding the provisions of section 3224 of the Revised Statutes the making of such assessment or the beginning of such proceeding or distraint during the time such prohibition is in force may be enjoined by a proceeding in the proper court.

SEC. 277. (*b*) The running of the statute of limitations provided in this section or in section 278 on the making of assessments and the beginning of distraint or a proceeding in court for collection, in respect of any deficiency, shall (after the mailing of a notice under subdivision (*a*) of section 274) be suspended for the period during which the Commissioner is prohibited from making the assessment or beginning distraint or a proceeding in court, and for sixty days thereafter.

SEC. 278. (*d*) Where the assessment of any income, excess-profits, or war-profits tax imposed by this title or by prior Act of Congress has been made (whether before or after the enactment of this Act) within the statutory period of limitation properly applicable thereto, such tax may be collected by distraint or by a proceeding in court (begun before or after the enactment of this Act) but only if begun (1) within six years after the assessment of the tax, or (2) prior to the expiration of any period for collection agreed upon in writing by the Commissioner and the taxpayer.

SEC. 278. (*e*) This section shall not bar a distraint or proceeding in court begun before the enactment of the Revenue Act of 1924; nor shall it authorize the assessment of a tax or the collection thereof by distraint or by proceeding in court (1) if at the time of

the enactment of this Act such assessment, distraint or proceeding was barred by the statutory period of limitation properly applicable thereto, unless prior to the enactment of this Act the Commissioner and the taxpayer agreed in writing thereto, or (2) contrary to the provisions of subdivision (*a*) of Section 274 of this Act.

SEC. 283. (*e*) If any deficiency in any income, war-profits, or excess-profits tax imposed by the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, or the Revenue Act of 1921, or by any such Act as amended, was assessed before June 3, 1924, but was not paid in full before the date of the enactment of this Act, and if the Commissioner, after the enactment of this Act, finally determines the amount of the deficiency, he is authorized to send by registered mail to the person liable for such tax notice of such deficiency, which notice shall, for the purposes of this Act, be considered a notice under subdivision (*a*) of section 274 of this Act. In the case of any such final determination the amount of the tax (whether deficiency or interest, penalty, or other addition to the tax) shall, except as provided in subdivision (*b*) of this section, be computed as if this Act had not been enacted, but the amount so computed shall be collected and paid in the same manner and subject to the same provisions and limitations (including the provisions in case of delinquency in payment after notice and demand, and the provisions relating to claims and suits for refund) as in the case of a deficiency in the tax imposed by this title, except as otherwise provided in section 277 of this Act and in subdivision (*i*) of this section.

SEC. 283. (*f*) If any deficiency in any income, war-profits, or excess-profits tax imposed by the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, or the Revenue Act of 1921, or by any such

Act as amended, was assessed before June 3, 1924, but was not paid in full before that date, and if the Commissioner after June 2, 1924, but before the enactment of this Act finally determined the amount of the deficiency, and if the person liable for such tax appealed before the enactment of this Act to the Board and the appeal is pending before the Board at the time of the enactment of this Act, the Board shall have jurisdiction of the appeal. In all such cases the powers, duties, rights and privileges of the Commissioner and of the person who has brought the appeal, and the jurisdiction of the Board and of the courts, shall be determined, and the computation of the tax shall be made, in the same manner as provided in subdivision (*c*) of this section, except as provided in subdivision (*j*) of this section and except that the person liable for the tax shall not be subject to the provisions of subdivision (*d*) of section 284.

SEC. 283. (1) In the case of any income, war-profits, or excess-profits tax imposed by prior Act of Congress, in computing the period of limitations provided in section 277 or 278 of this Act on the making of assessments and the beginning of distraint or a proceeding in court, the running of the statute of limitations shall be considered to have been suspended (in addition to the period of suspension provided for in subdivision (*b*) of section 277) for any period prior to the enactment of this Act during which the Commissioner was prohibited from making the assessment or beginning distraint or proceeding in court.

SEC. 1000. If the assessment or collection of any tax is barred by any statute of limitations, the decision of the Board to that effect shall, for the purposes of this title and of the Revenue Act of 1926, be considered as its decision that there is no deficiency in respect of such tax.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1930.

No. 115

W. P. BROWN & SONS LUMBER COMPANY,
PETITIONER,

v.

COMMISSIONER OF INTERNAL REVENUE,
RESPONDENT.

REPLY BRIEF FOR PETITIONER.

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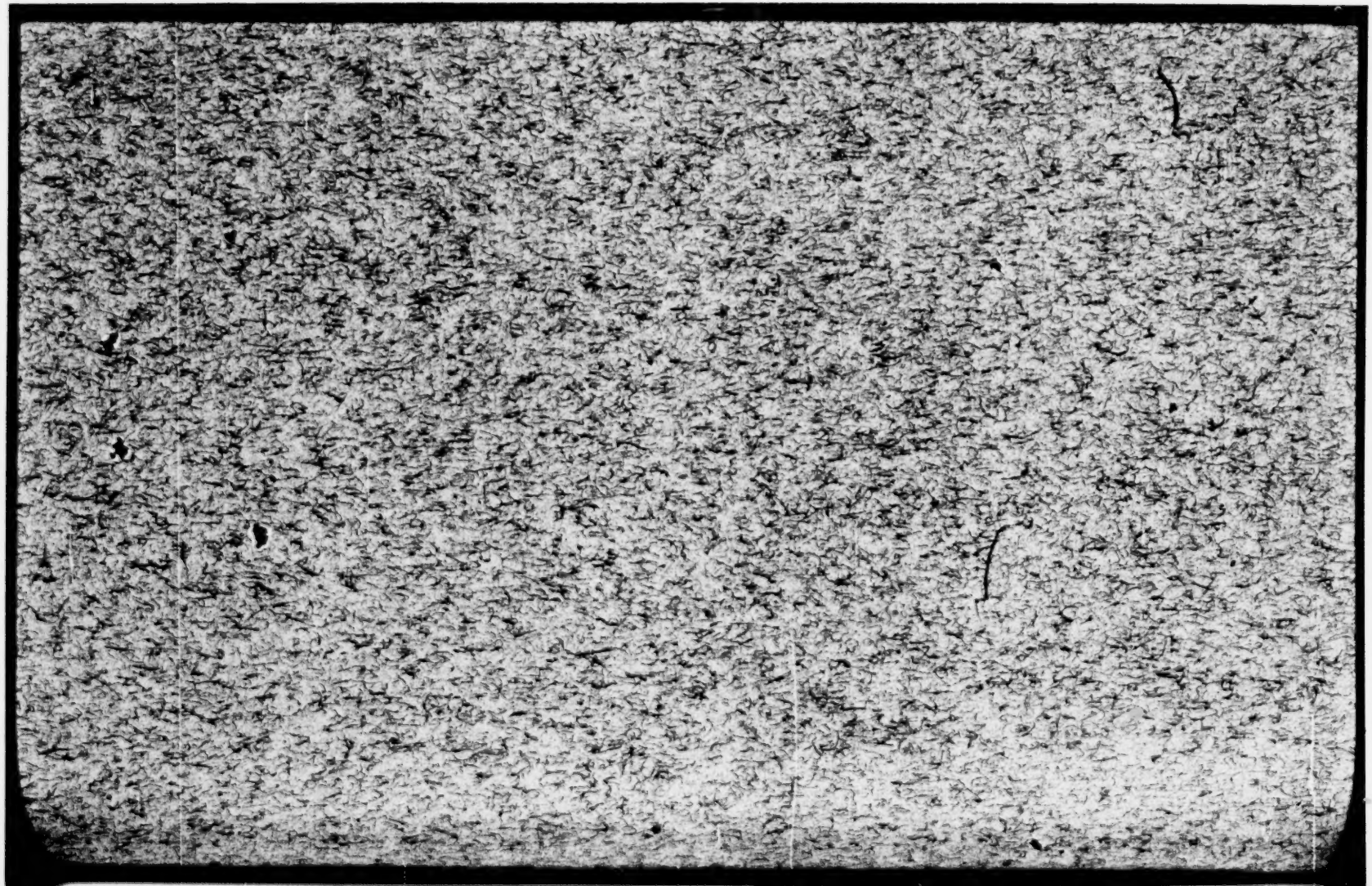

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REPLY BRIEF FOR PETITIONER.

MAY IT PLEASE THE COURT:

We take the liberty of submitting these suggestions by way of reply to the brief for respondent.

Counsel for petitioner has not discussed questions outside of the scope of the review as limited by the order of this Court.

It is contended in the brief for respondent that certain statutes extended the collection period which, as

we view this case, expired December 10, 1925. In this connection, the brief for respondent states:

> "A large part of the opinion of the Court below was concerned with this question, which, in the view taken by that Court, was not at all dependent upon the effect of the waivers. As the order of this Court limited the briefs and arguments to a discussion of the validity and effect of the waivers, we submit that the question of the effect of these statutes is not now open to review, and that petitioner is bound by the conclusions of the Court below."

The fact that the waiver of October 25, 1924, specified Section 277(*b*) of the Revenue Act of 1924 made necessary a discussion in our brief of that and related sections of the same act.

The limitation period for collection in the Revenue Act of 1926 (44 Stats. 9-55) is to be found in Section 278. Subdivision (*d*) of that section as amended provides for collection by "distraint or by a proceeding in Court, if begun prior to the expiration of any period for collection agreed upon in writing between the Commissioner and the taxpayer before the expiration of such six-year period". Cf. Section 506 of the Revenue Act of 1928 (45 Stats. 870). Subdivision (*e*) of this section provides that that section did not authorize the collection of any tax "barred by the statutory period of limitation properly applicable thereto unless prior to the enactment of this act the Commissioner and the taxpayer agreed in writing thereto".

The "writing" referred to in these sections is the form of agreement that is known in this record and in

the order granting the writ of certiorari as a "waiver". These provisions of the 1926 Act made it incumbent on counsel for petitioner to discuss that act also in connection with the waiver of October 25, 1924.

The order granting the writ served to distinguish between two discussions, viz., (*a*) that relating to the merits of the tax itself, which has not been discussed in petitioner's brief, and (*b*) that relating to the validity and effect of the waivers. Waivers relate to periods of limitation of time for assessment and/or collection of taxes. To discuss the effect of the waiver, one must discuss the applicable limitation statutes—not alone those believed by counsel to be in force and the application of whose provisions may be affected by the waiver, but also those believed by counsel to be inapplicable because, for instance, the waiver was not in force at the time of their enactment. Certainly, it was not intended that counsel should be precluded by the order from contending that the ultimate date specified in the waiver for assessment or collection was not affected by statutes then existing or subsequently enacted. Such a contention goes directly to the question of the *effect* of the waiver.

To us it seems clear that the waiver of October 25, 1924, which alone influenced the decision of the lower Court, expired according to its terms on December 10, 1925; and one of the questions we have here is whether the Revenue Act of 1924 at this point intervened, and whether later the Revenue Act of 1926 intervened, to extend the collection period to a date after August 10, 1928, that being the date on which the Board of Tax Appeals determined the deficiency in payment.

The lower Court, after holding the waivers valid, held that in view of their provisions the collection of the tax was not barred under the Revenue Acts of 1924 and 1926. Our contention is precisely the contrary. This being true, how else could we discuss the *effect* of the waiver under the 1924 and 1926 Acts except as we did?

If the question of the validity of the waiver should be decided adversely to petitioner, what would be accomplished by a decision, favorable to petitioner, that the ultimate date for collection under the waiver was December 10, 1925, if indeed the limitation period was extended by the Revenue Act of 1924 or that of 1926? It was not intended by the Court that the discussion should thus be confined to a question that would become moot if the lower Court was correct in its construction of the Revenue Acts of 1924 and 1926.

In the case of Florsheim Brothers Dry Goods Company *v.* United States, 280 U. S. 453, this Court had before it the question of the effect of a waiver *given before assessment*. In the opinion in that case, this Court, as a matter of course, considered and decided the effect of all applicable statutes. The question presented for decision was thus stated by the Court: "The claim that even if the assessment was timely the collection was barred, depends upon the effect of the 'Income and Profits Tax Waiver' and the applicability of the Revenue Acts of 1924 and 1926."

The *effect* of a waiver must be determined in any case in the light of applicable statutes.

The case of Florsheim Brothers Dry Goods Company v. United States, 280 U. S. 453, was distinguished in the decision from the class of cases we have here.

We take the following from the brief for respondent:

> "The contention of the petitioner that its tax liability has ended because the Revenue Acts of 1924 and 1926 did not serve to extend the period of collection which had not expired at the time of their enactment, was disposed of by this Court in the case of Florsheim Brothers Dry Goods Company *v.* United States, 280 U. S. 453."

In the Florsheim Brothers Company case, this Court was careful to distinguish the class of cases there involved from the class to which the present case belongs. In that case the assessment was made after March 15, 1925, and, therefore, after the passage of the Revenue Act of 1924. This being true, the case did not fall within the excepting clause of Section 278(*e*) of the Revenue Act of 1924 (43 Stats. 253-297), which provides that Section 278 "shall not * * * affect any assessment made or distraint or proceeding in Court begun before the enactment of this Act". In the present case the assessment was made in March, 1923, and, therefore, before the enactment of the 1924 Act. Said the Court in the Florsheim case:

> "The question as to the applicability of the later Acts may be briefly disposed of. Section 1100 of the Revenue Act of 1924 repealed the 1921 Act. Section 277(*a*)(2) of the 1924 Act expressly dealt with taxes due under the Acts of 1918 and 1921; and it reenacted the five-year